

Supreme Court, U. S.  
FILED  
NOV 18 1976  
MICHAEL RODAK, JR., CLERK

APPENDIX

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

—  
No. 75-1344  
—

RICHARD A. SCARBOROUGH,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

—  
ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
—

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PETITION FOR CERTIORARI FILED MARCH 17, 1976  
CERTIORARI GRANTED OCTOBER 4, 1976

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IN THE  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA )  
 )  
 v. ) CRIMINAL  
 ) NO. 240-73  
 RICHARD A. SCARBOROUGH )

**SEPTEMBER 1973 TERM—At Norfolk**

### THE GRAND JURY CHARGES:

That on or about August 1, 1973 at Fairfax County, Virginia in the Eastern District of Virginia, RICHARD A. SCARBOROUGH, having previously been convicted in 1972 of felonies in the Circuit Court of Fairfax County, Virginia, to wit: possession of a controlled drug with intent to distribute, unlawfully and knowingly did receive and possess in commerce and affecting commerce four firearms, that is, a Colt Cobra .38 caliber six shot revolver, serial number A67899; a Universal Arms Company .30 caliber Enforcer, serial number 161734; a .30 caliber United States M-1 Carbine, serial number 4794909; and a Model 1873, St. Etienne French Ordinance Revolver with serial number obliterated.

(Violation of Title 18, Appendix, United States Code,  
Section 1202(a))

A TRUE BILL:

FOREMAN

IN THE  
CIRCUIT COURT OF FAIRFAX  
COUNTY VIRGINIA

COMMONWEALTH OF VIRGINIA	)
	) Indictment—
vs.	) Possession of a
	) controlled drug
RICHARD A. SCARBOROUGH	) with intent to
	) distribute
	) # 17294

This 8th day of September, 1972, came the Commonwealth, by her Attorney, and the Defendant, RICHARD A. SCARBOROUGH, who stands convicted of a felony, to-wit: possession of a controlled drug with intent to distribute, appeared agreeably in accordance with his recognizance of bail; also appeared Philip J. Hirschkop, Counsel for the said Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the Defendant moved the Court to permit him to withdraw his former plea of guilty and enter a plea of not guilty and which motion the Court, after hearing argument thereon, denied.

Whereupon, the Defendant moved the Court to reduce the sentence heretofore imposed in this case on August 18, 1972, and which motion the Court granted. It is, therefore, ORDERED that the sentence of eight (8) years with five (5) years suspended heretofore imposed in this case be and the same is hereby vacated.

And nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that RICHARD A. SCARBOROUGH do serve one (1) year in the Penitentiary House of this Commonwealth; but in mitiga-

tion of punishment, it appearing compatible with the public interest so to do, the Court does now suspend the serving of the said sentence, conditioned upon the Defendant's good behavior and that he shall be on active probation subject to the conditions set forth in P. B. Form 2 Revised 6-71 for a period of one (1) year.

Whereupon, the Attorney for the Defendant advised the Court that it was the Defendant's desire at this time to withdraw the appeal formerly noted in this case.

The bond in this case heretofore continued for the purpose of appeal is hereby discharged and the Defendant is released on the conditions of the aforesaid probation.

/s/James C. Cacheris  
Judge

IN THE  
CIRCUIT COURT OF  
FAIRFAX COUNTY, VIRGINIA

COMMONWEALTH OF VIRGINIA	)
	) Indictment—
vs.	) Possession of a
	) controlled drug
RICHARD A. SCARBOROUGH	) with intent to
	) distribute
	) # 17295

This 8th day of September, 1972, came the Commonwealth by her Attorney, and the Defendant, RICHARD A. SCARBOROUGH, who stands convicted of a felony, to-wit: possession of a controlled drug with intent to



distribute, appeared agreeably in accordance with his recognizance of bail; also appeared Philip J. Hirschkop, Counsel for the said Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the Defendant moved the Court to permit him to withdraw his former plea of guilty and enter a plea of not guilty and which motion the Court, after hearing argument thereon, denied.

Whereupon, the Defendant moved the Court to reduce the sentence heretofore imposed in this case on August 18, 1972, and which motion the Court granted. It is, therefore, ORDERED that the sentence of eight (8) years with five (5) years suspended heretofore imposed in this case be and the same is hereby vacated.

And nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that RICHARD A. SCARBOROUGH do serve six (6) years in the Penitentiary House of this Commonwealth, at hard labor; but in mitigation of punishment, it appearing compatible with the public interest so to do, the Court does now suspend the serving of the said sentence, conditioned upon the Defendant's good behavior and that he shall be on active probation subject to the conditions set forth in P. B. Form 2 Revised 5-71 for a period of six (6) years. The sentence and probationary period imposed in this case shall run concurrently with the sentence and probation imposed in case numbered 17294.

Whereupon, the attorney for the Defendant advised the Court that it was the Defendant's desire at this time to withdraw the appeal formerly noted in this case.

The bond in this case heretofore continued for the purpose of appeal is hereby discharged and the Defendant is released on the conditions of the aforesaid probation.

/s/James C. Cacharis  
Judge

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DISTRICT COURT—GOVERNMENT'S ANSWER TO  
DEFENDANT'S MOTION FOR BILL OF PARTICULARS [Paragraph 5]—October 5, 1973

\* \* \*

5. With respect to paragraph 5 of the defendant's Motion, the possession of the four weapons by defendant on August 1, 1973 at 2145 Pimmit Drive, Falls Church, Fairfax County, Virginia, affected commerce since the weapons had previously traveled in commerce as follows:

(a) Colt Cobra—shipped by Colt Firearms Co. from Hartford, Connecticut on May 12, 1969 to Curries Sporting Goods, Rockingham, North Carolina. The weapon ended up by unknown means in Virginia.

(b) M-1 Universal Enforcer—manufactured in Hialeah, Florida and shipped on April 30, 1969 to Carter Gun Works, Charlottesville, Virginia. Subsequently acquired by Clark Brothers Firearms, Warrenton, Virginia who sold it on March 20, 1970 to the defendant.

(c) M-1 Carbine—shipped by U.S. Army on September 2, 1966 from Rock Island, Illinois to Homer M. Brett, Chevy Chase, Maryland. By unknown means it traveled to Virginia to the possession of the defendant.

(d) Model 1873 St. Etienne French Ordinance Revolver—manufactured prior to 1892 in France, and never manufactured in the United States. The weapon moved from France by unknown means to Virginia to the possession of the defendant.

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## TESTIMONY OF MR. D'ARCY

\* \* \*

[p. 54] A My name is Mr. D'Arcy. I am a customer service rep for Colt Firearms.

[p. 55-56] \* \* \*

Q Now, does this record reflect from that that the weapon was shipped from the Colt factory in Hartford to Rockingham, North Carolina?

A Yes. Yes, it does.

Q From your records is there a way that you can tell whether that particular weapon has been received down there or just whether its been shipped?

A No, we can't tell if it has been actually received. We just know that it was shipped.

Q What was the date that particular Colt Cobra revolver was shipped, sir?

A The invoice date is 5/9/69.

Q Was that a new weapon, sir?

A Yes, it was.

Q Does Colt manufacture this weapon outside of Hartford, sir? Is this weapon manufactured outside the State of Connecticut rather?

A No. It is totally assembled within the State of Connecticut.

\* \* \*

## TESTIMONY OF TONY MARTIN

\* \* \*

[p. 59] A Yes, sir. My name is Tony Martin. I am owner of Curries Sporting Goods in Rockingham, North Carolina.

\* \* \*

[p. 60] Q Let me ask you, sir, were you able to state from your records whether in fact a Colt .38 caliber revolver, A 67899, in fact this weapon, if you look at the

serial number, was received by your company in Rockingham, North Carolina?

A Yes, sir, it was.

Q All right, sir. When was it received?

A It came in the store, oh, let's see the date was—one moment and I have that on the log book—on 5/15/69.

Q What was done with that weapon by your company after it was received, sir?

A It stayed in the store for two or three months until the date of eight—it's on that, I think—eight something and at that time it was given back to a Mr. Jim Lewis or James G. Lewis, who was a rep for Colt.

\* \* \*

## TESTIMONY OF MARTHA PEARSON

[133] Q Ma'am, would you please state your name and your occupation?

A Martha Pearson. I am a clerk at Clark Brothers Company.

Q Let me direct your attention back to 1970 and ask if you had occasion to sell a Universal Enforcer to one Richard A. Scarborough? Did you have occasion to sell a firearm to him?

A I did sell the firearm to him.

THE COURT: What was the date?

Q What was the date of the transaction?

A March 20, 1970.

\* \* \*

## TESTIMONY OF ROBERT SOMERSTEIN

\* \* \*

[p. 135] Q Sir, would you please state your name and your occupation?

A My name is Robert Somerstein, and I am Vice President of Universal Firearms.

Q Where is your company located, sir?

A In Hialeah, Florida.

Q Does your company manufacture firearms in Florida, in Hialeah?

A Yes, we do.

Q Do you manufacture any arms outside of Florida—your company?

A Well, we have shotguns manufactured for us in Italy and Spain, and we import them but we manufacture only firearms ourselves in Hialeah.

\* \* \*

[p. 136] Q Do your records reflect where—can you state from your records where the Universal Enforcer was shipped to, this particular Serial No. 161734?

A Yes, I can. It went to Carver Gun Works.

Q Where is that located, sir?

A At 2211 Jefferson Parkway and 21st, Chartersville, Virginia.

Q Is that Charlottesville?

A Charlottesville, excuse me.

Q What was the date that that weapon was shipped?

A May 21, 1969.

\* \* \*

#### TESTIMONY OF MORRIS PALOS

\* \* \*

[p. 63] A My name is Morris Palos and my occupation I am a general supply specialist, Department of the Army. I am a Department of the Army civilian and I work for the U.S. Army Command located at Rock Island, Illinois.

\* \* \*

[p. 63-64] Q All right, sir. I would ask you if you have brought with you any existing records pertaining to a .30 caliber M-1 .30 caliber M-1 carbine with a serial No. 4794909?

A Yes, I have.

\* \* \*

[p. 64-65] Q What is the record that you brought with you and what does it reflect, sir?

A This record is called a sales record. It is a part of the, a form that we have to indicate sale of this carbine to the individual, in this case Homer M. Brett.

Q And what is the address that reflects where Mr. Brett was when this weapon was sold to him?

A This weapon was sold to Mr. Brett in 1966 and the address at that time was 3513 Leland Street, Chevy Chase, Maryland.

Q And can you state as far as or from your records what happened to this weapon? What your shipment procedure is?

A The shipping procedure for this weapon is that once we get this form which is approved by the NRA office in Washington, the two copies of this form is mailed to the NRA member and we get the third copy. We hold the third copy in suspense. Upon receipt of the second copy which is released by the recipient or the NRA member, we then process the form for shipping instructions and in this case here, this weapon was shipped from the Oak Island Arsenal.

Q It was shipped from Oak Island Arsenal, that is in Illinois?

A Yes, in Oak Island, Illinois, sir.

\* \* \*

#### TESTIMONY OF ROBERT SCROGGIE

\* \* \*

[p. 68] A Robert Scroggie, S-c-r-o-g-g-i-e. Firearms enforcement analysis for the Alcohol, Tobacco and Firearms Bureau.

\* \* \*



[p. 70] Q It will fire. Now that weapon, the Snatton revolver, can you tell us about this particular weapon, sir? First of all as to where it is manufactured and whether this weapon has ever been manufactured in the State of Virginia?

A The weapon was a French service weapon from 1873 up through World War Two. They ceased production along the 1880's in France, the weapon was never manufactured in the United States.

\* \* \*

#### TESTIMONY OF RICHARD SCARBOROUGH

\* \* \*

[p. 87-88] Q Mr. Scarborough, with regard to these weapons here, have you ever seen this weapon before?

A Yes, sir.

Q Did you purchase this weapon?

A Yes, sir, I did.

Q Do you recall when that was?

A Early '70.

Q This Cobra, did you purchase that weapon?

A Yes, sir, I did.

Q Where did you purchase this?

A Clark Brothers, sir.

Q This is Exhibit No. 1. Is Clark Brothers in the State of Virginia?

A Yes, sir, Warrenton.

Q Do you recall approximately when you purchased this weapon?

A The exact date, no. It was early in '70 also.

Q I asked you about the Enforcer a minute ago. This is Exhibit No. 3. Where did you purchase this weapon?

A Clark Brothers.

\* \* \*

[p. 107-08]

Q And from where did you obtain the carbine, the M-1 carbine?

A I bought it from a private individual.

Q Who was that, sir?

A Donald Webb.

Q When was that?

A I believe sometime in '68. I don't know the exact date. It was in the summer of '68.

\* \* \*

#### TESTIMONY OF WILLIAM SEALS

\* \* \*

[p. 102-02a] Q Agent Seals, let me direct your attention to later that morning. Did you have any occasion to return to that premises?

A Yes, I did.

Q Did you have any kind of legal document with you?

A Yes, sir.

Q What was that?

A I was with Fairfax County officers who had in their possession a state search warrant to search the premises.

Q Did you in fact observe a search at that premises?

A Yes, sir, I did.

Q Were you able to personally observe any kind of weapons being found, sir?

A Yes, sir, I was.

Q Would you describe where they were found, and what they were?

A Yes, sir. The first weapon located was a .38 caliber, 2-inch revolver, Colt.

The second weapon located was another revolver of French manufacture, St. Etienne revolver.



The next two weapons located were the .30 caliber U.S. M-1 carbine, and the other weapon was a Universal Arms Company Enforcer, .30 caliber.

Q Could you describe the layout of the house, in which rooms, if any, these weapons were found?

A Yes, sir. They were located in what appeared to be the master bedroom of that residence.

\* \* \*

#### DISTRICT COURT—MOTION FOR JUDGMENT OF ACQUITTAL

[p. 77] MR. HIRSCHKOP: Your Honor, at this time, we would make a motion for judgment of acquittal based on two grounds. In the case of *United States versus Bass*, it is the Supreme Court decision, the case there draws a distinction between the possessing and receiving of firearms.

\* \* \*

[p. 79] THE COURT: I think the evidence is sufficient to show that they did travel in interstate commerce prior to the conviction.

\* \* \*

[p. 80] THE COURT: I think under the *Mullins* case [*United States v. Mullins*, 476 F.2d 664 (4th Cir. 1973) (per curiam)] it is sufficient to go to the jury here on possession. But I think there should—the motion for judgment of acquittal should be and will be granted insofar as receipt is concerned.

#### DISTRICT COURT—DEFENDANT'S REFUSED INSTRUCTION

In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the

Government to demonstrate a nexus between the "possession" of the firearms and interstate commerce. For example, a person "possesses" in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the "possession" affected commerce. It is not enough that the Government merely show that the firearms at sometime had travelled in interstate commerce. Accordingly, if the Government has failed to meet the burden cast upon it to show the connection between the possession of the firearms and interstate commerce, the defendant must be found not guilty.

#### DISTRICT COURT CHARGES TO JURY

[p. 155-56] The indictment in this case charges that on or about August 1, 1973, at Fairfax County, Virginia, in the Eastern District of Virginia, Richard Scarsborough having previously been convicted in 1972 of a felony in the Circuit Court of Fairfax County, Virginia, to wit, possession of a controlled drug with intent to distribute, unlawfully and knowingly did receive, did possess, not receive, but did possess in commerce and affecting commerce four firearms, that is a Colt Cobra .38 chamber 6 shot revolver, a Universal Arms Company .30 caliber Enforcer, a .30 caliber United States M-1 carbine and a model L1873 St. Etienne French ordinance revolver.

Three essential elements are required to be proved to establish this offence. First, the act of possessing a firearm in commerce of affecting commerce. Second, the doing of such act knowingly and third, the doing of such act after having been convicted of a felony.

\* \* \*

[p. 158-59] You will recall that the elements of the offense include the act of possession and says that it must be in commerce or affecting commerce. The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously travelled in interstate commerce.

Interstate commerce is commerce between one state and another state, or the District of Columbia, and so a firearm that is sent or carried from one state to another or into another state from without that state travels in interstate commerce.

It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun.

\* \* \*

[p. 162-63] I would like to comment briefly on the evidence and because my comment is based on my recollection of the evidence, and since it is your recollection that counts, you are free to disregard any part or all of this comment that you desire to.

There is no doubt in fact the defendant has stipulated that he was convicted of a felony before August 1, 1973 when this offense is supposed to have taken place. And while the government must prove the connection with interstate commerce beyond a reasonable doubt, under the instruction which I gave you which allows the government to meet that burden by showing that the weapon or weapons had previously been transferred in interstate commerce, there seems to me to be not much of an issue on that score.

\* \* \*

[p. 168] THE COURT: Members of the jury, I have your questions and I will read them for the record.

The first one is: If Mr. Scarborough merely knew the guns were in the house, is he guilty of this crime?

\* \* \*

[p. 169-70] The other question is: Can he own a gun if made and purchased in the State of residence?

Ownership of the gun is not the requirement of its possession, not ownership that is the test and it is not necessarily where purchased.

The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously travelled in interstate commerce. It is not necessary that the government prove that the defendant purchased the gun in some state other than where he was found with it, or that he carried it across the state line, nor must the government prove who did purchase the gun.

What I have given you is an abbreviated or shortened form of the total charge. You should consider all the other instructions of the Court and you must remember always, of course, that no defendant can be convicted unless all of the elements of the offense including possession, constructive or otherwise, and including its connection with interstate commerce has been proved beyond a reasonable doubt.

\* \* \*

[p. 171-72] THE COURT: The counsel have indicated that perhaps I didn't adequately or completely answer your second question.

Can he own a gun if made and purchased in the State of residence? If the gun were manufactured in Virginia, and that was his state of residence, and if it were purchased in Virginia and had no connection with

interstate commerce, then there would be no offense because the offense here must have a connection with interstate commerce.

Now, whether the evidence proves to you, as it must, beyond a reasonable doubt that it has an interstate connection as that term has been defined is up to you to decide. You must, you must find that element by proof beyond a reasonable doubt along with the other elements in the case.

\* \* \*

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## RELEVANT DOCKET ENTRIES

### United States District Court:

9/10/73 INDICTMENT  
 9/21/73 Arraignment. Defendant released on bond.  
 10/03/73 MOTION for bill of particulars—filed by Defendant.  
 10/05/73 GOVERNMENT'S answer to Defendant's motion for bill of particulars—filed.  
 10/05/73 Hearing on motions.  
 10/23-24/73 Jury trial—Defendant convicted and released on bond.  
 11/30/73 Sentencing. Judgment and commitment order entered.  
 12/07/73 NOTICE of appeal filed.  
 12/10/73 ORDER extending time for filing record on appeal.  
 2/12/74 Record on appeal in three volumes sent to United States Court of Appeals.

### United States Court of Appeals:

8/08/75 Trial transcript filed.  
 9/09/75 Appellant's brief and Appendix filed.  
 10/06/75 Government brief filed.  
 11/14/75 Case argued.  
 1/29/76 Opinion of Court of Appeals.

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